has never been acted on in the practical working of the law. So far from agreeing with Wightman and Erle, JJ., that the fact of there having been hitherto no decision expressly declaring the liability of lodging-house keepers, is a proof that they are right in their judgment, we submit that it is just as admissible as a proof that they are wrong: for a rule of law perfectly understood and generally acted upon, is for that very reason seldom the subject of the decision or *dictum* of a Court *in banco*.

RECENT AMERICAN DECISIONS.

In the Supreme Court of the United States, December Term, 1854.

WILLIAM FONTAIN, APPELLANT, *vs.* WILLIAM RAVENEL.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

1. A testator devised as follows: "Forasmuch as there will be a surplus income of my estate beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, * * * * and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, * * * * * I authorize and empower my executors, or the survivor of them, after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefit thereof." All the executors of the will died before the testator's widow, and without having attempted to make an appointment under the power conferred on them. *Held*, That the disposition of the residuary estate of the testator, subject to the power of appointment of the executors, failed, and that the heirs and next of kin of the testator were entitled to it.

2. No Court of Chancery, either in South Carolina or Pennsylvania, can administer the fund in question, and it remains unaffected by the bequest, because the means through which it was to have been given and applied have failed.

3. In England, when the Chancellor directs the application of property which has been the subject of an ineffectual charitable disposition, in accordance with the will of the sovereign, indicated under the sign-manual, or when that officer

himself executes the *cy pres* power in regard to such property, he does not act in the discharge of his ordinary chancery powers.

4. No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of the wife of the testator; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator to the power rendered the appointment impossible.

5. There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but there is a more formidable objection—there is no expressed will of the testator. He intended to speak through his executors, or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken, and no power can now speak for him except that of the *parens patriæ*.

6. When there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of his estate. To meet such cases, a prerogative power, such as that of the king, in England, must be invoked, which there, through the Chancellor, can give effect to the charity.

7. Some late decisions in England, involving charities, evince a disposition rather to restrict than enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a king, or chancellor, or both, leads to uncertainty and injustice.

The nominal plaintiff below, who is the appellee, is the administrator of the estate of the decedent *de bonis non cum testamento annexo*. His interest is with the defendant, as he and his family are the next of kin and heirs at law of Mr. Kohne.

The bill is filed by certain charitable societies of Philadelphia, in the name of the plaintiff, and it claims the appropriation of the residuary estate of Mr. Kohne, for themselves, and the other charitable societies of Pennsylvania and South Carolina, under the directions contained in Mr. Kohne's will, (which is hereinafter recited): first seeking to recover from the defendant, as executor of Mrs. Eliza Kohne, so much of that estate as came to her hands, as the executrix of Mr. Kohne's will, and which she distributed as undisposed of property, after the death of her co-executors.

Mr. Kohne, the testator, was a native of the kingdom of Prussia, and came to this country in the year 1789; immediately thereafter he established himself in business in the city of Charleston, South Carolina.

There was some evidence to show that his domicil remained unchanged during his whole life; and on the other hand, there was evidence that, at the time of his death, his legal residence was in Philadelphia.

Mr. Kohne, the testator, died on the 26th of May, 1829, leaving a large amount of real and personal estate, of the then value of about $611,000, exclusive of his real estate at Charleston.

By his will, which is dated April 28, 1829, he gave to his wife certain personal property, and an annuity of $10,000, with the power of appointing a sum of $10,000 by her will, and he also devised to her the residue of his Charleston real estate and his Philadelphia dwelling house and country seat, for the term of her life, authorizing and empowering her to dispose of a portion of his Charleston real estate, "to such religious institution or institutions, in fee simple, and for such purposes as she might see fit."

The testament closes with the provision, which gives rise to the present controversy, "forasmuch as there will be a surplus income of my estate, beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income, and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, in the purchase of such stocks or securities of the United States, or the State of Pennsylvania, or of any other State or States of the United States, or of the City of Philadelphia, bearing an interest, as they, in their discretion, may see fit; and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, including the fund which shall have arisen from the said surplus income aforesaid, after payment of the legacies hereinbefore directed to be paid after the decease of my said wife, and after providing for the payments of the annuities hereinbefore given of those annuitants who may then still be living, I authorize and em-

power my executors, or the survivor of them, after the decease of my said wife, to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population, in each of the said States of Pennsylvania and South Carolina, shall partake of the benefit thereof; and I do hereby further authorize and empower them, or the survivor or survivors of them, after my said wife's decease, for the better and more easy disposing of my said residuary estate, as aforesaid, to sell, and to make and execute good and sufficient deeds and conveyances of real estate, not hereinbefore specifically disposed of, to the purchaser or purchasers thereof, his, her, or their heirs and assigns, in fee simple."

The executors thus authorized and empowered, after the decease of the testator's wife, to dispose of his surplus estate with its accumulations, were his wife, his "respected friends John Bohlen and Roberts Vaux, of the City of Philadelphia," and his "respected friend Robert Maxwell, formerly of Charleston." All of the executors died before the wife of the testator. Mrs. Kohne died in the City of Philadelphia, on the 1st day of March, 1852.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery, from the Circuit Court of the United States for the Eastern District of Pennsylvania.

The case involves the construction of the will of Frederick Kohne. He first settled in Charleston, South Carolina, where he engaged in active business and accumulated a large fortune. For many years before his death, his residence was divided between Charleston and Philadelphia. At the latter place he added much to his wealth in the acquisition of real and personal property. He had furnished houses in both cities, and a country-house in the neighborhood of Philadelphia. Until his health became infirm he resided a part of the year in the South, and the other part in the North. In May, 1829, he died in Philadelphia, where his will was made and published in the month of April preceding his death. In his will he declared himself to be of the city of Philadelphia.

After giving several annuities to his wife and others, and legacies to his friends in this country and in foreign countries, to charitable objects, and providing for the payment of them, he declares, "forasmuch as there will be a surplus income of my estate, beyond what will be necessary to pay my said wife's annuity and the other annuities, I do therefore direct my said executors to invest the said surplus income and all accumulation of interest arising from that source yearly, for and during all the term of the natural life of my said wife, in the purchase of such stocks or securities of the United States or the State of Pennsylvania, or of any other State or States of the United States, or of the city of Philadelphia, bearing an interest, as they in their discretion may see fit; and from and immediately after the decease of my said wife, then all the rest, residue and remainder of all my estate, including the fund which shall have arisen from the said surplus income aforesaid, after payment of the legacies hereinbefore directed to be paid, after the decease of my said wife, and providing for the payment of the annuities hereinbefore given, of those annuitants who may then be still living, I authorize and empower my executors or the survivor of them, after the decease of my said wife to dispose of the same for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind, and so that part of the colored population in each of the said States of Pennsylvania and South Carolina shall partake of the benefits thereof." His wife, Eliza Kohne, John Bohlen and Roberts Vaux, of the city of Philadelphia, and Robert Maxwell, of the city of Charleston, were appointed executors.

Mrs Kohne survived her co-executors some years, and then died, having made her last will and testament, and appointed James L. Petigru and William Ravenel, the defendant, executors, the latter of whom obtained letters testamentary in the county of Philadelphia. And on the 15th of October, 1852, William Fontain, the complainant, obtained letters of administration de bonis non, on the estate of Frederick Kohne, deceased; he being the nearest of kin to the deceased, and one of his heirs at law.

The bill is filed in the name of the complainant, by certain charitable societies of Pennsylvania and South Carolina, under the directions

of the will, to recover from the defendant, as executor of Mrs. Kohne, so much of the property as came to her hands as the executrix of her husband's will, and which she distributed as undisposed of property, after the death of her co-executors. And the question in the case is, whether the residuary bequest in the will, which authorized his executors or the survivor of them, after the death of his wife, to dispose of the surplus "for the use of such charitable institutions in Pennsylvania and South Carolina as they might deem most beneficial to mankind," has lapsed, no such appointment having been made or attempted to be made during the lifetime of the executors. This part of the property is understood to have amounted to a large sum.

The domicil of the testator, at the time of his death, seems not to be a controverted question. He had so lived in the two States of Pennsylvania and South Carolina, and amassed property in both, that his domicil might be claimed in either. There is no evidence in which, if in either, he exercised the right of suffrage. For two years previous to his death he resided in Pennsylvania.

The bequest under consideration was intended to be a charity. The donor, having entire confidence in his executors, substituted their judgment for his own. They, or the survivor of them, was to designate such objects of his charity in the two states "as would be most beneficial to mankind." It was to be placed on the broadest foundations of human sympathy, not excluding the colored race. It is no charity to give to a friend. In the books it is said, the the thing given becomes a charity, where the uncertainty of the recipients begins. This is beautifully illustrated in the Jewish law, which required the sheaf to be left in the field for the needy and passing stranger.

It may be admitted that this bequest would be executed in England. A charity rarely, if ever, fails in that country. The only question there is, whether it shall be administered by the chancellor in the exercise of his ordinary jurisdiction, or under the sign manual of the Crown. Thus furnished with the judicial and prerogative powers, the intent of the testator, however vaguely and remotely expressed, if it be construed into a charity, effect is generally given

to it. It is true, this is not always done in the spirit of the donor, for sectarian prejudices, or the arbitrary will of the king's instruments, sometimes pay little or no regard to the expressed will of the testator.

The appellants endeavor to sustain this charity, under the laws of Pennsylvania. This is according to the course of the court. The case of *The Philadelphia Baptist Association* vs. *Hart's Executors*, 4 Wheat. 1, was decided under the laws of Virginia, which had repealed the statute of 43 Elizabeth. In *Beatty* vs. *Kurtz*, 2 Peters, 566, the pious use of a burial-ground was sustained under the Bill of Rights of Maryland. The case of *Wheeler* vs. *Smith*, 9 How. 55, was ruled under the laws of Virginia. And in the case of *Vidal* vs. *Girard's Executors*, the laws of Pennsylvania governed.

In *Wheeler* vs. *Smith*, this court said, when this country achieved its independence, the prerogatives of the Crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the Federal Government. The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the *parens patriæ*.

There can be no doubt that decisions have been made in this country on the subject of charities, under the influence of English decrees, without carefully discriminating whether they resulted from the ordinary exercise of chancery powers, or the prerogatives of the Crown.

The courts of the United States cannot exercise any equity powers, except those conferred by acts of Congress and those judicial powers which the high Court of Chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the Constitution of the United States. Powers not judicially exercised by the chancellor, merely as the representative of the sovereign and by virtue of the king's prerogative as *parens patriæ*, are not possessed by the circuit courts.

In 2 Story's Eq. 431, it is said: "But as the Court of Chancery may also proceed in many, although not in all, cases of charities by original bill, as well as by commission under the statute of Eliza-

beth, the jurisdiction has become mixed in practice; that is to say, the jurisdiction of bringing informations in the name of the attorney-general has been mixed with the jurisdiction given to the chancellor by the statute. So that it is not always easy to ascertain in what cases he acts as a judge, administering the common duties of a court of equity; and in what cases he acts as a mere delegate of the Crown, administering its peculiar duties and prerogatives. And again, there is a distinction between cases of charity, where the chancellor is to act in the Court of Chancery, and cases where the charity is to be administered by the king, by his sign-manual. But in practice the cases have been often confounded from similar causes."

"It is a principle in England that the king, as *parens patriæ*, enforces public charities, where no person is entrusted with the right. Where there is no trustee, the king, by his lord chancellor, administers the trust, as the keeper of the king's conscience; and it is not important whether the chancellor acts as the special delegate of the Crown, or the king acts under the sign-manual, his discretion being guided by the chancellor."

It may be well again to state the precise question before us. "The executors or the survivor of them, after the decease of the testator's wife, was authorized to dispose of the property, for the use of such charitable institutions in Pennsylvania and South Carolina as they or he may deem most beneficial to mankind."

No special trust is vested in the executors, by reason of this power of appointment. It is separable and distinct from their ordinary duties and trust as executors. It was to be exercised after the death of Mrs. Kohne; but the executors died before her decease, and consequently they had no power to make the appointment. The conditions annexed by the testator rendered the appointment impossible. Had the contingency of the death of Mrs. Kohne happened, as the testator from her advanced age contemplated, during the life of the executors or the survivor of them, the appointment might have been made at his or their discretion. But had they or the survivor of them failed to make it, it might have become a question whether he or they could have been coerced to do so by the exercise of any known chancery power in this country. The will

contained no provision for such a contingency, and it could not be brought under the trust of executorship. Chancery will not compel the execution of a mere naked power. 1 Story's Eq., sec. 169. But it will, under equitable circumstances, aid a defective execution of a power. A power when coupled with a trust, if not executed before the death of the trustee, at law the power is extinguished, but the trust, in chancery, is held to survive.

The testator was unwilling to give this discretion to select the objects of his bounty, except to his executors. He relied on their discrimination, their judgment, their integrity and fitness, to carry out so delicate and important a power. He made no provision for a failure in this respect, by his executors or the survivor of them, nor for the contingency of their deaths before Mrs. Kohne's decease. They died before they had the power to appoint, and now what remains of this bequest, on which a Court of Chancery can act?

There must be some creative energy to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through his executors or the survivor of them, but by the acts of Providence this has become impossible. It is then as though he had not spoken. Can any power now speak for him, except the *parens patriæ?* Had he declared that the residue of his estate should be applied to certain charitable purposes, under the statute of 43 Elizabeth, or on principles similar to those of the statute, effect might have been given to the bequest, as a charity, in the State of Pennsylvania. The words, as to the residue of his property, were used, in reference to the discretion to be exercised by his executors. Without their action, he did not intend to dispose of the residue of his property.

It is argued, "that in England the chancellor, in administering charities, acts as the delegate of the Crown, inasmuch as he discharges all his judicial functions in that capacity." If by this it is intended to assert, that the chancellor, in affixing the sign-manual of the king, or when he acts under the cy-pres power, is in the dis-

charge of his ordinary chancery powers, it does not command our assent.

The statute of 43 of Elizabeth, though not technically in force in Pennsylvania, yet by common usage and constitutional recognition, the principles of the statute are acted upon in cases involving charities. *Witmon* vs. *Lex*, 17 Serg. & Rawle, 88.

In the argument, the case of *Maggridge* vs. *Thackwell*, 7 Ves. 86, was cited, as identical with the case before us. "The only difference between that case and this one, it is said, is, that in the former the devise was for objects not defined, as they are in this case." In this the counsel are somewhat mistaken, as the case of Maggridge will show.

The devise in the will of Ann Cam was, "and I give all the rest and residue of my personal estate unto James Vaston, of Clapton, Middlesex, gentleman, his executors and administrators, desiring him to dispose of the same in such charities as he shall think fit, recommending poor clergymen who have large families and good characters; and I appoint the said John Maggridge and Mr. Vaston, before mentioned, executors of this my will."

In the final decree "upon a motion to vary the minutes, Lord Thurlow declared, that the residue of the testatrix's personal estate passed by her will, and ought to go and be applied to charity," &c.

Now here was a trust created not only in Vaston, but in his executors and administrators, to whom the residue of the estate was bequeathed for the purposes of the charity. In this view, Lord Thurlow might well say, "the residue of the personal estate passed by the will." This was true, though Vaston was dead when the will took effect. This being the case, it is difficult to say that that case is identical with the one before us.

The case of *Maggridge* vs. *Thackwell* was before Lord Eldon on a rehearing. He entered into a general view of the subject of charities by the citation of authorities, which showed the unreasonableness of the doctrine maintained by the courts, the inconsistencies in the decisions in such cases, and the gross perversions of charities by the exercise of the prerogative power; but at last he says: "Therefore I rather think the decree is right. I have conversed

with many upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose not fixing itself upon any object, as this in a degree does, the disposition is in the king by sign-manual; but where the execution is to be by a trustee with general or some objects pointed out, there the court will take the administration of the trust. But," he observes, "it must be recollected that I am called upon to reverse the decree of a predecessor, and of a predecessor who, all the reports inform us, had great occasion to consider the subject. I should hesitate with reference to that circumstance; but where authority meets authority, and precedent clashes with precedent, I doubt whether I could make a decree more satisfactory to my own mind than that which has been made."

It will be perceived that this decision was made reluctantly, and after much balancing of the law and the force of precedents, and chiefly, as it would seem, in respect to the decree of Lord Thurlow. This decision of Lord Eldon was made in 1802, and it is not known to have been recognized in this country.

Neither the doctrines on which this decision is founded, nor the doubts expressed by the chancellor, are calculated very strongly to recommend it to judicial consideration. The case, however, is different from the one before us in this: the residuary estate of Mrs. Cam passed to the trustee; that of Mr. Kohne remained as a part of his estate in the hands of the executors, and descended to his heirs at law on the death of Mrs. Kohne. The beneficiaries were not more definitely described in the one case than in the other. In Kohne's case no trust was created, except that which was connected with the executorship.

Where there is nothing more than a power of appointment conferred by the testator, there is nothing on which a trust, on general principles, can be fastened. The power given is a mere agency of the will, which may or may not be exercised at the discretion of the individual. And if there be no act on his part, the property never having passed out of the testator, it necessarily remains as a part of

his estate. To meet such cases, and others, the prerogative power of the king, in England, has been invoked, and he, through the chancellor, gives effect to the charity.

It would be curious as well as instructive, on a proper occasion, to consider the principles, if principles they can be called, which were first applied in England to charities. Their most learned chancellors express themselves, in some degree, as ignorant on this subject. Lord Eldon said, in the case of Maggridge, "in what the doctrine originated, whether, as Lord Thurlow supposed, in the principles of the civil law, as applied to charities, or in the religious notions entertained formerly in this country, I know not; but we all know there was a period when a portion of the residue of every man's estate was appropriated to charity, and the ordinary thought himself obliged so to apply it, upon the ground that there was a general principle of piety in the testator."

In the above case, Lord Eldon again says: "In *Clifford* vs. *Francis*, this doctrine is laid down: that when money is given to charity, without expressing what charity, there the king is the disposer of the charity; and a bill ought to be preferred in the attorney general's name. I cite this (he says) to show that it contains a doctrine precisely the same as the *Attorney General* vs. *Syderfin*, and the *Attorney General* vs. *Matthews*. So those three cases (he says) seemed to have established, at the year 1679, that the doctrine of this court was, that where the property was not vested in trustees, and the gift was to charity generally, not to be ascertained by the act of individuals referred to, the charity was to be disposed of not by a scheme before the master, but by the king, the disposer of such charities in his character of parens patriæ.

Some late decisions in England, involving charities, evince a disposition rather to restrict than to enlarge the powers exercised on this subject. An arbitrary rule in regard to property, whether by a king or chancellor, or both, leads to uncertainty and injustice.

In a late case of *Clark* vs. *Taylor*, 21 Eng. Law and Eq., 308, a gift by will to a particular charitable institution maintained voluntarily by private means, the particular intention having ceased:

held that the gift was not to be disposed of as a charitable gift cy-pres, but failed and fell into the residue."

In the case of the Baptist Association, Chief Justice Marshall says, there can be no doubt that the power of the Crown to superintend and enforce charities existed in very early times; and there is much "difficulty in marking the extent of this branch of the royal prerogative before the statute. That it is a branch of prerogative, and not a part of the ordinary powers of the chancellor, is sufficiently certain." And in the case of the *Attorney General* vs. *Flood*, Hayne's Rep. 630, it is said: "The court of chancery has always exercised jurisdiction in matters of charity, derived from the Crown as parens patriæ."

In the provisions of the act of Pennsylvania defining the powers of a Court of Chancery, in 1836, it is declared, "that in every case in which any Court, as aforesaid, shall exercise any of the powers of a Court of Chancery, the same shall be exercised according to the practice in equity, prescribed or adopted by the Supreme Court of the United States."

In June, 1840, an act extended the jurisdiction of the Supreme Court within the city and county of Philadelphia, in chancery, in cases of "fraud, accident, mistake, or account;" and since then an act has been passed giving the Orphans' Court power, where a vacancy happens in a trust, to fill it, and also power to dismiss trustees, executors, &c., for abuse of their trusts, &c. But no statutory provision is found embracing the case before us.

The chancery powers are of comparatively recent establishment in the State of Pennsylvania, and it does not appear that the cy-pres power is given, and in the exercise of jurisdiction it seems to be disclaimed.

In *King* vs. *Rundle*, 15 Barber, 139, "there being a number of charitable bequests to several charitable bodies, the remainder was bequeathed or devised to the Protestant Episcopal Society for certain purposes, &c.; the bequests to the religious bodies were held invalid, and so of the remainder over, as not being statutory tests. In *Yates* vs. *Yates*, 9 Barber, 324, the Court say: "We come to the conclusion, that as a court of equity we possess no original inhe-

rent jurisdiction, to enforce the execution of a charitable trust void in law, as contravening the statute against perpetuities, as being authorized. In this case, where the use is a pious one, additional reasons might be urged against the exercise of such jurisdiction, were it important. Unless this trust will stand the statutory test to be applied to it, it must fall.

In the will of Sarah Zane, Mr. Justice Baldwin, sitting in Pennsylvania, and speaking of trustees, says, "they will be considered as trustees acting under the supervision of this Court as a Court of Chancery, with the same powers over trusts as courts of equity in England and the courts of this State profess and exercise." "When the fund shall be so ascertained as to be capable of a final distribution, it will be directed to be applied exclusively to the objects designated in the will, as they existed at the time of her death, and shall continue until a final decree; if any shall then appear to have become extinct, the portion bequeathed to such object must fall into the residuary fund as a lapsed legacy. Its appointment to other purposes or cestuis que trust than those which can by equitable construction be brought within the intention of the will of the donor, is an exercise of that branch of the jurisdiction of the Chancellor of England which has been conferred on this Court by no law, and cannot be exercised, virtute officii, under our forms of government."

And again, in *Wright* vs. *Linn*, 9 Barr, 433, Bell, J., says: "Though in the statute of 43 Elizabeth, c. 4, relating to charitable uses, has not in terms been recognized as extending to Pennsylvania, we have adopted not only the principles that properly emanate from it, but, with perhaps the single exception of cy-pres, those which by an exceedingly liberal construction the English courts have engrafted upon it."

In the *Methodist Church* vs. *Remington*, 1 Watts, 226, the Court says: "The original trust, though void, was not a superstitious one; nor if it were, would the property, as in England, revert to the State, for the purpose of being appropriated in eodem genera, as no Court here possesses the specific power necessary to give effect to the principle of cy-pres, even were the principle itself not too

grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment."

In *Ray* vs. *Adams*, 3 Mylne & Keen, 237, it was held, "that where a power is by will given to a trustee, which he neglects to execute, the execution of the trust devolves upon the Court; but if, in the events which happen, the intended trustee dies before the time arives for the execution of the trust, and the trust therefore fails, the testator is to be considered as having so far died intestate.

In the case of *Ommanney* vs. *Butcher*, 1 Turn. & Russ. 260, a testator concluded his will: "In case there is any money remaining, I should wish it to be given in private charity." *Held*, "if the testator meant to create a trust, and the trust is not effectually created or fails, the next of kin must take."

There appears to be no law or usage in South Carolina that can, materially, affect the question under consideration. It seems to be conceded, that if this charity cannot be administered by this Court in the State of Pennsylvania, it cannot be made available by the laws of South Carolina.

After the investigation we have been able to give to this important case, embracing the English chancery decisions on charities as well as our own, and the cases decided in Pennsylvania, we are not satisfied that the fund in question ought to be withdrawn from those who are in possession of it, as the heirs of Frederick Kohne. There does not appear to us to be any safe and established principle, in Pennsylvania, which, under the circumstances, enables a Court of Chancery to administer the fund. It has not fallen back into the estate of the testator, because it was not separated from it. It remains unaffected by the bequest, because the means through which it was to be given and applied have failed. The decree of the Circuit Court is, therefore, affirmed.

In the Court of Appeals of New York—In Equity.

BRYANT BURWELL *vs.* AMANSEL D. JACKSON.

AMANSEL D. JACKSON *vs.* BRYANT BURWELL.

1. A covenant "to make a good and sufficient deed of conveyance" is not satisfied by the execution of a deed good in point of *form* only; there is an implied undertaking to make a good title.
2. In an executory agreement to purchase land, the purchaser is not bound to examine the title before entering into the agreement, and if the title prove defective upon examination, the vendee cannot be compelled to take it.
3. The implied warranty of the vendor ceases upon the execution of the deed, as the vendee is presumed to have examined the title and to be satisfied with it.
4. The cases of *Gazely* vs. *Price*, and *Parker* vs. *Parmlee*, commented on.
5. The covenants in this case are dependent covenants, and the execution of the deed is a condition precedent to the payment of instalments subsequent to the first.
6. Where the title of a vendor who has covenanted to convey is totally destroyed, the vendee is not bound, either to offer to perform on his part, or to require performance by the vendor, but may treat the contract as rescinded.

On the first day of June, 1835, an agreement was made, under the hands and seals of the respective parties, between James D. Bemis, Pierre A. Barker, John W. Clark, and Roswell W. Haskins, of the first part, and Arenton J. Douglass, of the second part, by which the said Bemis and his associates agreed, that, on the performance by said Douglass of the covenants on his part, they would "execute, or cause to be made and executed, unto the said party of the second part, or his legal representative or representatives, *on the first day of June*, 1836, a good and sufficient deed of conveyance of a certain lot of land in the city of Buffalo," describing it.

Douglass, the party of the second part, covenanted as follows: "to pay for said lot of land the sum of two thousand five hundred dollars, in ten equal annual payments, with annual interest on the whole sum; the first instalment of the interest which shall then

have accrued to be paid on the first day of June, 1836, at which time, and on delivery of the deed aforesaid, a bond and mortgage for the remaining purchase money shall be executed by the party of the second part, or his legal representative or representatives, payable as above stipulated."

The agreement also contained a provision, that in case of non-performance by Douglass of any of the covenants on his part, Bemis and his associates might re-enter, and that all the rights of Douglass under the agreement should thereupon cease.

The lot described in the agreement was part of a large tract of land, then owned by the parties of the first part, in the city of Buffalo, which tract was subject, at the date of the agreement, to several mortgages, covering the whole or separate portions thereof; and among others, to a mortgage for twenty thousand dollars, given by the said Pierre A. Barker to Mark H. Sibley, for the purchase money of a portion of the said tract. These mortgages were all on record in June, 1835, when the agreement was made.

Prior to June, 1836, the defendant in the original suit, Amansel D. Jackson, purchased the interest of Douglass in the agreement for the sum of one thousand dollars, and took an assignment from Douglass, with the consent of Bemis and his associates.

On the 8th day of June, 1836, Jackson paid the sum of one hundred and thirty-three dollars, in cash, upon the contract, and gave his note for two hundred and ninety-two dollars, which was accepted in full of the first instalment, due June 1st, 1836.

On the 18th July, 1836, the four proprietors, Bemis and others, executed and acknowledged a deed of the lot described in the agreement, and also prepared a bond and mortgage to be executed by Jackson, and left both the deed and the bond and mortgage in the hands of their clerk, where they remained, nothing further having been done in regard to them; and nothing more was ever paid, or offered to be paid, by Jackson, upon the contract.

By some arrangement between the four proprietors, the note of Jackson for $292 became the property of John W. Clark, who brought an action in his own name, and in May, 1838, recovered a judgment for the amount of the note.

In April, 1838, the four proprietors made a partition among themselves of the whole tract, by which the lot in question was assigned, together with other parcels, in severalty to the said Pierre A. Barker, it being provided by the deed of partition, that the portion so assigned in severalty to the said Barker, should be subject to the said mortgage from him to Mark H. Sibley. The contract with Douglass was also assigned to Barker by the partition deed.

An execution was duly issued upon the judgment against Jackson to the Sheriff of Erie County, where he resided, and returned *nulla bona.*

In December, 1839, the judgment was assigned to the plaintiff, Burwell, for the consideration expressed in the assignment, of one dollar, which was the only evidence of any payment by Burwell.

In 1846, the mortgage from Barker to Sibley was foreclosed by the assignee of Sibley, and the premises, including the lot in question, were sold under a decree of the Court of Chancery, and conveyed by the master to Walter Joy, the purchaser at the sale.

In May, 1847, the plaintiff, Burwell, filed a creditor's bill, being the bill in the original suit, to enforce the collection of the judgment on the note, containing the usual allegations; and in November, 1849, he also sued out an attachment against Jackson, under the provisions of Article 1, Title 1, Chap. 5, Part 2, of the Revised Statutes, for the purpose of collecting the same judgment, upon which the property of Jackson was seized by the sheriff; and in order to secure a discharge of the property, a bond was executed, with sureties, pursuant to the statute, upon which bond a suit was commenced by the plaintiff, Burwell, to which the defendant therein pleaded, and which is still pending.

Three of the original proprietors of the said tract of land, to wit: Barker, Clark, and Haskins, became insolvent as early as 1839 or 1840. The fourth, Bemis, has always been and is still solvent.

Jackson put in an answer to the original bill, setting up as a defence, among other things, the foregoing facts, with the exception of those relating to the suing out of the attachment: and subsequently filed a cross-bill, alleging the same facts, and also the fact

of the issuing and execution of the attachment and the subsequent proceedings thereupon: and praying for a perpetual injunction against the collection of the judgment.

The original and cross suit were referred to a sole referee to hear and decide, who sustained the bill in the original suit, and directed the appointment of a receiver, and an assignment by the defendant in the usual form in that suit, and a dismissal of the bill in the cross suit.

The Supreme Court in the Eighth District confirmed the report, and gave judgment for the plaintiff in the original suit, and for the defendant in the cross suit. From this judgment the defendant in the original suit, and plaintiff in the cross suit, appealed to this Court.

The opinion of this Court was delivered by

SELDEN, J.—This case will be rendered comparatively simple, by considering, first, what would be the rights of the parties, in case the original vendors had retained their interest in the note, and had themselves obtained the judgment and filed the creditors' bill and sued out the attachment in their own names: Because, if the defendant in the original suit would have had no defence as against them, he can have none as against the plaintiff, Burwell. On the other hand, if we arrive at the conclusion, that the defence set up would be good, if the note had been sued and the creditors' bill filed in the names of the four original proprietors of the lot in question, we have then only to see what there is in the case to give to the plaintiff, Burwell, any other or greater rights than the vendors themselves would have had.

Viewing the case in this light, it becomes indispensable in the outset, to put a construction upon the main covenant contained in the original agreement on the part of the vendors. It can never be known which party is in default, until their mutual obligations are ascertained.

The vendors agreed, that on the performance by the purchaser of the covenant on his part, they would "execute, or cause to be made and executed, unto the said party of the second part, or his legal

representative or representatives, on the first day of June, 1836, a good and sufficient deed of conveyance of a certain lot of land, &c." Is this covenant satisfied, by the execution of a deed good in point of form merely, or does it require such a deed as will convey *a good title* to the land sold?

If those obvious principles of natural justice which the law applies to analagous cases, are to be applied to this, it would seem that the question here presented ought not to admit a serious doubt. Upon every sale of *a chattel*, the law implies a warranty on the part of the vendor, that he is the owner of the property and has a right to convey, although nothing whatever is said on the subject.

This is not an arbitrary or accidental rule, but one which rests upon a solid foundation of reason and justice. It is fair and just to presume that a vendor knows the nature and extent of his own right. The vendee has not the same means of knowledge. To require a vendor, therefore, to make good the title to that which he assumes to sell, is simply requiring him to guaranty that he is not committing a fraud.

It is a principle universally recognized by all civilized codes, that whenever a thing sold has some latent defect, known to the seller, but not to the purchaser, the former is liable for this defect, unless he discloses his knowledge on the subject to the latter, before the completion of the sale. The doctrine of implied warranty of title rests upon the same principle. The only difference is, that in case of a defect in title, knowledge by the vendor *is presumed*, but when the defect is in quality merely, the common law requires it to be proved.

It is obvious that the reason upon which this doctrine is based, applies no less to sales of real than of personal estate. Moral writers, and writers upon natural law, make no distinction between the two cases. Cicero de Off. 3, 13; Grotius de Jure, &c., 1, 2, ch. 12, sec. 9. Neither does the civil law. 1 Domat, part 1, book 1, title 2, sec. 10, art. 6, et seq; Pothier on Cont. of Sale, sec. 82, 87, et seq. I think, too, that the common law, notwithstanding the many subtle distinctions and modifications of the rule which it has adopted,

will be found to have adhered, substantially, to this acknowledged principle of right. Some of its earliest rules are based upon it.

Originally, the customary words of conveyance in a deed, amounted to a warranty; as the word *dedi* in a feofment, or *concessi* in a grant for years. Coke Litt. 384, a. This doctrine had its foundation in the principle of implied warranty of title. The words demise and grant in a lease, are still held to import a covenant for quiet enjoyment. *Grannis* vs. *Clark*, 8 Cow. 36. But the same rule has not been applied to the operative words ordinarily used in the more modern forms of conveyance; and since the case of *Frost* vs. *Raymond*, 2 Caines, 188, it has been regarded as settled in this State, that, neither the words grant, bargain, sell, alien or confirm, when used in a *conveyance* of real estate, import a warranty. We have a statute, also, which provides that "no covenant shall be implied in any conveyance of real estate." 1 R. S. 738, sec. 140. The practice has now become universal, both in England and in this country, for purchasers to protect themselves by procuring the insertion of express covenants in their deeds of conveyance; and it is found to be most consonant to justice, to apply the maxim *caveat emptor* to such cases, and to require the purchaser to look to his express covenants alone.

But neither this rule, nor the reason upon which it is founded, applies to *executory* agreements to sell and convey lands *in futuro*. In respect to such agreements the principles upon which the doctrine of implied warranty rests, are still applied, as well in England as in this country, with all their force. It has been repeatedly held in England, that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects; and these decisions have been made without any regard to the particular language of the agreement to purchase. They rest upon the principle of implied warranty of title, and can have no other basis. *White* vs. *Foljambe*, 11 Vesey, 337; *Deverill* vs. *Lord Bolton*, 18 Vesey, 508; *Waring* vs. *Mackreth*, Forrest, 129.

It seems never to have been doubted that this was the rule in case of a sale of a freehold, nor of a leasehold, so far as the right

of the vendor to the lease itself was concerned; but it was for a long time a disputed question in England, whether upon a sale of a mere leasehold interest, the vendor was bound to show, not only that he owned the lease and had authority to sell it, but that the original lessor had power to create the term. This question was finally settled by the Court of Exchequer in 1821, in the case of *Purvis* vs. *Rayer*, 9 Price, 488. In that case it was held, after great deliberation, that if a contract be made for the sale of leasehold property unconditionally, and without a stipulation *in terms*, on the part of the vendor, that he meant to sell *his interest* only, and that he would not warrant the lessor's title, he is bound to show the right of the original lessor to *grant the lease.*

The Lord Chief Baron in this case rests his decision upon the general principle, that *every vendor*, whether of lands or of goods, *impliedly warrants* his title to be good to what he sells; the only question being whether that rule, in case of a sale of a mere leasehold interest, extended to the title of the landlord. He says: "The principle applies to everything; and there seems to me to be no sound reason why leaseholds should be an exception. If an estate of inheritance be sold, *it is admitted on all hands*, that the vendor must produce his title; and why, then, is a purchaser bound to take a lease for a term of years, in equity or honesty, although after he has paid the purchase-money, it may not last an hour."

But it may be said, that this last case, as well as those previously cited, arose in equity, and that it may well be that a Court of Equity would not enforce a specific performance, while at law the purchaser would be bound. There is, however, no doubt that the rule at law is the same as in equity.

The case of *Doe* vs. *Stanion*, 1 Mees. & Wels., 695, was an action at law. The purchaser in that case was the tenant of the vendor. The agreement to purchase was in the following terms:—"1831, September 2d. Samuel Stanion purchased an estate in the parish of Corbey, bought of Robert Gray, at the sum of £100. Received on account 10*l.* Mr. Robert Gray is willing to let the same lie by paying 4 per cent." This agreement was signed by the parties,

and 10*l.* deposit paid. It was held that there was an implied warranty of title in that case. PARKE, B., in giving his opinion, says: "Is, then, the contract in question a contract of this conditional nature: to purchase for £100, provided a good title should be made and the estate transferred? We conceive that there is no doubt but that it is to be so construed; for in the first place, in contracts for the sale of real estate, an agreement to make a good title *is always implied*, of which the case of *Souter* vs. *Drake*, 5 Barn. & Adolph. 992, is a strong instance."

The case here referred to by Baron Parke, was an action at law to recover the price agreed to be paid for a leasehold estate. The agreement on the part of the plaintiff, was simply *to assign the lease and deliver up possession*, and this he offered to do; but the defendant refused to pay, because the plaintiff did not show a good title in the *original lessor*. The Court held the defendant right in refusing. Chief Justice Denman says: "For the reasons above given, we come to the conclusion, that, unless there be *a stipulation to the contrary*, there is in every contract for the sale of a lease, *an implied undertaking* to make out the lessor's title to demise, as well as that of the vendor to the lease itself, which implied undertaking is available *at law* as well as in equity."

These cases seem never to have been disputed. They are referred to, and recognized in, the latest editions of Sugden's Law of Vendors, as sound expositions of the law. It is clear, therefore, that in England there is in every executory contract for the sale of lands, whatever may be the language in which the agreement is couched, an implied undertaking to make a good title, unless such an obligation is expressly excluded by the terms of the agreement. In this State, also, the decisions have generally been in accordance with this principle of the common law. *Seymour* vs. *De Lancey*, 6 Johns. Ch. R. 222, S. C.; 3 Cowen, 445; *Emerson* vs. *Kirtland*, 4 Paige, 628; *Clute* vs. *Robinson*, 2 Johns. 595; *Judson* v. *Wass*, 11 Johns. 525; *Van Eps* vs. *Corporation of Schenectady*, 12 Johns. 442. The cases of *Gazely* vs. *Price*, 16 Johns. 267, and *Parker* vs. *Parmlee*, 20 Johns. 130, are, however, exceptions.

In the first of these two cases the covenant was, "to give the

defendant a good and sufficient deed for the premises;" and the Court held that this covenant was performed by the execution of a deed, sufficient *in point of form*, to convey whatever title the vendor might have. In the other case, the plaintiff had covenanted to execute to the defendant a "good warrantee deed of conveyance of the premises; and it was decided that he was not bound to convey a good title, but simply to execute a deed containing a covenant of warranty.

In *Fletcher* vs. *Button*, 4 Coms. 396, Judge Ruggles reviewed all these cases; and although it did not become necessary, in that case, to pass definitively upon the principles adopted in *Gazely* vs. *Price*, and *Parker* vs. *Parmlee*, yet the learned Judge clearly intimates, that, in his opinion, those cases could not be reconciled either with the previous decisions, or with sound reason. In reference to the case of *Parker* v. *Parmlee*, he says: "But the reasoning in that case falls short of showing, that a covenant to execute a good and sufficient deed of conveyance, is satisfied by a deed of conveyance which *conveys* nothing."

If the words of such a covenant were to be construed simply according to their grammatical import, without reference to the nature of the contract in which they occur, it might lead to the conclusion arrived at in *Parker* vs. *Parmlee*. But the authorities to which I have referred, show conclusively that, whatever may be the language of a vendor, in a contract for the sale of lands, the *law implies* an undertaking that he *has*, and will *convey*, a good title. In the case of *Souter* v. *Drake*, supra, the vendor, *in terms*, only agreed that he would *assign the lease, and deliver possession*. He offered to do both: but the Court held that he must show, *in addition* to this, that the *landlord* had a good title. All the cases on this subject which have been properly decided, have been, like this case, based not upon a grammatical or literal interpretation of the language of the covenant, but upon the doctrine of implied warranty, applicable to all cases of sale: in respect to which the rule is the same, in equity and at law.

I have no hesitation, therefore, in holding that, under a covenant like that, in this case, to execute "a good and sufficient deed of

conveyance" of lands, a vendee has a right, if he discover the title to be defective, to refuse to receive it; and this right is not affected by the fact, that the defect might have been discovered at the time of entering into the agreement to purchase, by an examination of the public records. Executory agreements for the purchase of lands are frequently made, under circumstances which afford neither time nor opportunity for a thorough examination; and the purchaser cannot be presumed, prior to entering into such an agreement, to have investigated the title. But, aside from this, a vendee can never *be bound*, as between him and the vendor, to search the records for defects of title. The protection of vendors from the consequences of agreeing to sell that which they do not own, constitutes no part of the object of the recording acts: nor is it any answer to a warranty, either express or implied, that the purchaser might, *by inquiry*, have ascertained it to be false. The reason why the implied warranty on the part of the vendor ceases, upon the consummation of the contract of sale, by the execution of a deed, is not that the vendee is presumed to have investigated the title and discovered the defects, if any there be, but that it is reasonable to require the vendee, in taking a deed, which is a more solemn and deliberate act than entering into a preliminary agreement for the purchase, to protect himself by an express warranty, agreeably to common usage. The defendant, therefore, was not bound to take a title to the lot, subject to the incumbrances upon it, notwithstanding those incumbrances were on record. What, then, in view of these principles, were the respective rights and duties of the parties, under their agreement?

The defendant Jackson, upon making, as he did, the first payment, had a right to require the execution of a deed by the vendors. But in order to put them in default for not executing it, it was incumbent on him to demand execution. So on the other hand, the vendee could not be put in default, for not executing the bond and mortgage, until the vendors had made and tendered their deed.

Neither party ever made any such demand or tender. It is clear, therefore, that at the time when the second instalment became due, neither party could rescind, because neither had a right to treat

the other party as having failed in the performance of his contract. They stood upon an equal footing, and the contract continued obligatory upon both.

Did the non-payment of the second and subsequent instalments then, put the vendee or his assigns in default? Upon the doctrine of some of the cases, this question would be answered in the affirmative. But the case of *Grant* vs. *Johnson*, 1 Seld., 247, has settled the principle, that covenants, like those in this case, are dependent, and that the execution of the deed is a condition precedent to the payment of the instalments *subsequent* to the first. The vendee, or his assigns, therefore, were never put in default in this case. The consequence of this conclusion is, that his right to demand the execution of a deed, upon payment of the arrearages, continued up to the time of the sale upon the Sibley mortgage.

This sale and the conveyance under it, put it out of the power of the vendors to convey any title to the purchaser. This, of course, under the construction of the covenant which we have adopted, authorized the assignee of the vendee to treat the contract as rescinded, unless it should be held that he was bound still to demand a deed. I consider it settled, however, that no such demand was necessary.

The rule on this subject was laid down at an early day, in *Sir Anthony Main's Case*, 5 Coke, 21, and seems to have been generally adhered to since. In that case, Sir Anthony had given a bond to his tenant to make a new lease at any time, *upon the surrender of the old one*. Being sued upon the bond, he pleaded, that the tenant had not surrendered; to which the latter replied that he, Main, had conveyed away the reversion, and on demurrer, the replication was held good. It is said by Cowen, J., in *Harrington* vs. *Higgins*, 17 Wend. 376, that this case was never questioned, and he cites a number of cases, in which the same principle was adopted. The case of *Harrington* vs. *Higgins*, itself, does not conflict with this rule, because the covenants in that case were held to be independent, and because the defendant in that case was guilty of the first default.

I think it may be assumed, therefore, that the law is, that where

the title of a vendor, who has contracted to convey, is totally destroyed, the vendee is not bound, either to offer to perform, on his own part; or to require performance by his vendor, but may at once treat the contract as rescinded.

It follows from this, that upon the sale and conveyance under the foreclosure of the Sibley mortgage, the defendant, Jackson, had an immediate cause of action against the vendors, to recover back the money paid; and of course, that he had a good defence as against them, to any legal proceedings to enforce the collection of the note, given for the balance of the first instalment. "They could have no just right to collect money which they would be instantly bound to refund to the party from whom it was received. No Court, and especially no Court of Equity, would countenance any such claim. It is not a case where the defendant is concluded by the judgment; because the defence did not exist until long after the judgment was recovered. No defence existed until the sale under the Sibley mortgage. Until that event occurred, the vendee had no right to rescind the contract. The vendors had not been put in default by a demand for the conveyance of the lot; and it would have been sufficient for them, if they were able to make a good title when required to convey, which, until the sale they might have done, by paying off the mortgage. This conclusion renders it unnecessary to notice any of the other points made by the counsel.

It remains only to inquire, whether there is anything in the case to give the plaintiff, Burwell, any greater rights than the original vendors themselves would have had. The transfer of the note to Clark, and the recovery of the judgment by him, could not of course change his relations to the maker of the note, as one of the original vendors. The same obligations which rested upon them jointly, rested also upon him individually.

It is very doubtful, therefore, if Burwell were a *bona fide* purchaser for a consideration paid, whether this would give him any greater rights than Clark, the plaintiff, himself had. Possibly, however, as the defence did not exist at the time of the assignment, it might. But it does not appear that he was such a purchaser. The assignment expressed a nominal consideration, merely, of one dollar; and there was no proof that anything was paid.

In the case of *Jackson* vs. *Caldwell*, 1 Cowen, 622, it was held that it was not sufficient for a party, claiming to be a *bona fide* purchaser, to show a conveyance *expressing* a consideration, but he must go further, and show a consideration actually paid. I think this a just rule. But I do not understand it to be claimed in this case, that Burwell was a *bona fide* purchaser. On the contrary, the case states that he had become *trustee* for Clark; and I infer that he held this judgment in his character as trustee, and not in his own right.

This, under the views already taken, is decisive of the case. The judgment in the Supreme Court must be reversed, and the bill in the original suit dismissed. The prayer of the cross bill, for a perpetual injunction should be granted, and the proceedings remitted to the Supreme Court, with instructions to carry into effect this judgment.

In the Supreme Court of Ohio.

ROBERT DAVIDSON *vs.* NELSON W. GRAHAM ET AL.

1. A declaration, setting out nothing but a general or ordinary engagement by the defendants as common carriers, is not supported by proof of a contract, containing a special exception of the liability of the defendants for any loss which may arise from "the damage of the river, fire, and unavoidable accident." In such case, the plaintiff must be non-suited on the ground of variance between pleadings and proofs.
2. Such special exception to the defendant's liability may be lawfully created by special contract between the parties, though it cannot be made by general notice, known or unknown to the party engaging the services of the common carrier. The case of *Jones* vs. *Voorhees*, 10 O. R. 145, explained.
3. Although the common carrier may by special contract restrict his liability, so far as he is an insurer against losses by mistake or accident, he cannot thus exempt himself from losses caused by any neglect of that degree of diligence pertaining to his peculiar character as bailee.
4. The burden of proof, that the loss occurred from one of the excepted causes, rests on the defendant.

This was an action of assumpsit, reserved by the District Court of Muskingum county, on a motion for new trial. The opinion of

the Court, which was delivered by Mr. Justice Bartley, shows the facts and pleadings fully.

Jewett, Brush & Ball, for plaintiff.

Goddard & Eastman, for defendant.

BARTLEY J.—This suit was instituted to recover damages for the loss of certain goods entrusted to the defendants as common carriers on the Muskingum river. The declaration sets forth an undertaking by the defendants in ordinary and general terms as common carriers and owners of the steamboat "Newark," to transport the goods and merchandise of the plaintiff from Marietta to Zanesville; avers the defendant's failure to deliver the goods according to his understanding, and their loss on the way, by the defendant's negligence.

The defendants pleaded the general issue.

It appears, that on the trial of the cause in the District Court, the plaintiff, after giving evidence tending to prove that the defendants were common carriers between Marietta and Zanesville, and owners of the steamboat "Newark," offered in evidence the bill of lading, which contained the terms of a special contract between the parties, for the transportation of the goods in question, from Marietta to Zanesville, on said steamboat, *specially excepting the liability of the defendants for the dangers of the river, fire, and unavoidable accidents.* But the plaintiff offered no evidence to show "the loss of the goods within the terms of the special contract." The Court directed the plaintiff to be non-suited. The plaintiff excepted to the ruling of the Court, and also moved for a new trial. And the cause was reserved for decision here upon the questions raised by the motion for new trial.

The ruling of the Court below is questionable on two grounds. The first has relation to a question of variance between the proof and the declaration as to the contract between the parties; and the second, to the sufficiency of the proof of loss of the goods.

The declaration sets out nothing but a general or ordinary engagement on behalf of the defendants as common carriers. The evidence offered is that of a contract containing a special exemption of the

liability of the defendants for any loss which may arise from "*the damage of the river, fire, and unavoidable accident.*" It is requisite that a declaration on a contract, should set out the contract truly, either in terms or by its legal import. If the defendants had the right to make this special exception to their ordinary liability as common carriers, it became a *material* stipulation in the contract, and as such, became an essential part of the description of the contract in the declaration. The *materiality*, therefore, of this special provision in the contract, involves the much contested question, *whether the common carrier has the right to limit his common law liability, by special agreement.*

This is a question of great and increasing importance, and requires the most careful consideration. The different branches of business connected with the various modes of transportation have been vastly extended. And not only the facilities and means of public conveyance, but also the actual amount of transportation, have been so greatly increased, that the laws relating to the duties and liabilities of common carriers have acquired far more extensive application than formerly. And it is of the utmost importance that they should be settled with certainty and a just regard to the multiplied and still growing interests to which they relate.

It has been well settled, both in England and in this country, for many years, that a common carrier is liable for all losses which do not fall within the excepted cases of the act of God or the public enemy. The ordinary bailee for hire, or private carrier is liable only for neglect of ordinary care; but the common carrier is held to a higher degree of diligence, and is not only answerable for losses arising from slight neglect, but is in one sense an *insurer* of the property entrusted to him, being responsible for losses by accident or mistake from whatever cause arising, the acts of God and the public enemy only excepted. The loss of, or damage done to, property entrusted to the common carrier, is of itself sufficient proof of negligence; the maxim of the law being, that every thing is negligence which the law does not excuse. The peculiar duty and high responsibility which has been imposed upon the common carrier, arise from the public character of his employment, the

extensive control he exercises over the property of others, and the facilities which he usually has for securing impunity for an abuse of his trust. Kent's Com., Vol. II., p. 597.

But whether the common carrier can limit this liability by *special agreement*, and if so, to what extent, does not seem to be so well settled, and there is much conflict in the decisions upon the subject in England as well as in this country. It was held by the Supreme Court of New York, in *Gould* vs. *Hill*, 2 Hill Rep. 625, that the common carrier is restrained by public policy from limiting his liability by express agreement. And this doctrine has been recognized, at least, as law by the Courts of several of the other States. *Fish*, &c., vs. *Ross*, 2 Kelly, (Geo.) R. 349. *Thomas* vs. *Boston & Prov. Railroad Co.*, 10 Met. (Mass.) R. 479. And in the case of *Jones* vs. *Voorhees*, 10 Ohio Rep. 145, this doctrine was also recognized in the Supreme Court of this State; but that decision went no further than to decide that the proprietors of stage-coaches are common carriers, and, *as such*, cannot limit their own responsibility by *actual notice* to a traveler, that his baggage is at *his own risk*. The principle really settled in this case we feel no disposition to disturb, but some of the language used in the opinion needs qualification.

Many of the questions which have engaged the attention of courts touching this subject, have arisen upon alleged *implied* contracts, or rather upon the validity and effect of written or printed notices given by common carriers in the course of their public employment, announcing a limitation upon the carrier's liability for property entrusted to him. The validity of such notices was not recognized in Westminster Hall until the decision of the case of *Nicholson* vs. *Willan*, 5 East, 507, in the year 1804. But the doctrine became gradually and firmly established in England, until Parliament at length interfered, and by statutory provision controlled the effect of these notices, and restored the operation of the common law. Stat. 1 Will. 4, ch. 68. The adjudications in this country have generally shown a firm adherence to the strictness of the common law rule in regard to the responsibility of common carriers, and an inclination to restrict, and, in some of the States, to in-

validate the effect of notices upon that liability. It is held, in Pennsylvania, that although a common carrier may limit his responsibility by a general notice, yet, the terms of the notice must be *clear* and *explicit*, and the person with whom the carrier deals must be *fully informed* of the terms and effect of it. *Camden and Amboy R. R. Co.* vs. *Baldauf*, 16 Penn. St. Rep. 67. But in New York it is settled that the common carrier cannot restrict his liability by a general *notice*, even though the notice be clearly brought to the knowledge of the owner. *Cole* vs. *Goodwin*, 19 Wend. 251; *Hollister* vs. *Nowlan*, Ib. 235; *Wells* vs. *The Steam Navigation Co.*, 2 Comst. R. 204. This rule, which has been adopted also in several other States, and by the Supreme Court of the United States, in the case of *The New Jersey Steam Navigation Company* vs. *The Merchants' Bank of Boston*, 6 How. 344, fully sustains the principle decided in Ohio in the case of *Jones* vs. *Voorhees*, so far as it relates to the effect of the *notice* upon the carrier's liability.

The ground upon which the validity or effect of a notice to restrict the liability of a common carrier, is sought to be maintained, is that it amounts to a proposal of special terms in the engagement, and that the *assent* of the owner or employer will be *presumed* or *implied*. This reason is noticed by Mr. Justice Nelson, in the opinion in the case of *New Jersey Steam Navigation Co.* vs. *Merchants' Bank*, in the following language: "But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to. He is bound to receive and carry all the goods offered for transportation, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal. And we agree with the Court in the case of *Hollister* vs. *Nowlan*, that, if any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner

intended to insist upon his rights, and the duties of the carrier, as it is that he assented to their qualification."

In a matter of this nature, we think, that the *assent* of the owner or employer is not to be *implied*, and cannot reasonably be *presumed* from a notice, in the absence of proof of an express agreement. And we hold it to be settled in Ohio, at least, that the common carrier cannot restrict his liability by notice, verbal, written, or printed, even when brought to the knowledge of the owner or employer.

But the question recurs, where an express agreement between the parties actually exists, restricting the liability of the common carrier, is it wholly invalid? Upon what principle can it be rendered invalid? There is no incapacity in the parties to contract; neither is there any criminal or immoral element entering into the nature of the contract. The particular transaction to which it relates, involving simply the rights of property, and the service of the safe custody, carriage and delivery of goods, contains no element of illegality, and does not, perhaps, so far as that particular instance is concerned, injuriously affect the public interests, any more than the ordinary engagement of an *insurer* of goods, to which, in one respect, the engagement of the common carrier is analogous. But it is said, that a stipulated restriction upon the common carrier's liability, contravenes a principle of public policy—that the common carrier is in the exercise of a public employment, and that to allow him to stipulate for his own carelessness, or by special contract to provide impunity for his own misconduct or omissions of duty, would encourage negligence and open a wide door to fraud, in a business extensively affecting the commerce and interests of the community at large.

The liability of the common carrier, however, extends beyond that of losses by his own default or omissions of duty. He is liable for losses by accident, mistake, and numerous unavoidable occurrences, not falling within either of the two excepted perils, and against which it is not within the reach of human vigilance or foresight to provide. If the loss happen by the wrongful act of a third person; by an accidental fire, not caused by lightning; by the

agency of the propelling power in a steamship; by mistaking a light; by the goods being taken by robbers, or destroyed by a mob through force, which neither the carrier nor his agents could resist; or any other of the many unavoidable circumstances not within the two common law exceptions, the carrier is held liable. In the case of *Riley* vs. *Horne*, 5 Bing. 217, Mr. Chief Justice Best, in discussing the extent of the common carrier's liability, uses the following forcible language: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has, therefore, added to that responsibility of a carrier, which immediately arises out of his contract to carry for a reward, namely, that of taking *all reasonable care* of it, the responsibility of an *insurer*. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not; namely, the act of God and the king's enemies."

The liabilities of a common carrier may be distinguished into two distinct classes, according to their nature. The one, a liability for losses by neglect on the part of the carrier or his agents, which is the liability of a *bailee*, arising from omission of duty. The other, a liability for losses by accident, mistake, or other unavoidable occurrence, without any actual fault on the part of the carrier; which is the liability of an *insurer*, and founded upon a principle of the common law. No principle of *public policy* would seem to be contravened by a *special contract* restricting the liability of the common carrier for losses not arising from any neglect or fault on his part. Here he would not be stipulating for his own carelessness, or providing impunity for misconduct or any omission of duty

on his part. And it would appear reasonable that he should be allowed the means of protection to himself against misfortune, by limiting his liability as an insurer. Besides, the owner may prefer selecting his own insurer. The carrier may be unable to respond in case of loss. And if no restriction of this kind on his liability can be made by agreement, the owner would be subjected to the necessity of paying the carrier for his risk as insurer, and also for paying a premium to another for protection against the same loss for which the carrier is liable.

The right of the common carrier to restrict his common law liability by special agreement, is founded upon sound reason, and is fully sustained by the Supreme Court of the United States, in the case of *The New Jersey Steam Navigation Company* vs. *Merchants' Bank*, 6 How. 344. And the same doctrine is sanctioned by the greater weight of authority in this country and also in England.

The contract of the common carrier, therefore, restricting his liability, is not *invalidated* by public policy, but merely limited in its operation. The common carrier has the right to restrict his common law liability by special contract; and this extends to all losses not arising from his own neglect or omission of duty. He cannot, however, protect himself by contract from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. He is held to extraordinary diligence, that is, that degree of diligence which very careful and prudent men take of their own affairs. And he is responsible for all losses arising from a neglect of that high degree of diligence enjoined on him by his public employment. And public policy forbids that he should be relieved by special agreement from that degree of diligence and fidelity which the law has exacted in the discharge of his duties. All public agents are held to this high degree of diligence in the discharge of their trusts; and they are never allowed to contract for a less degree of diligence and fidelity than that which the law imposes. Any such contract would be regarded as illegal or against public policy, and therefore void. If a public agent can, by special contract, provide that he shall be held to, or made responsible only

for ordinary diligence in the discharge of his duties, he can of course go further, and provide that he shall not be answerable for more than slight diligence, or indeed for any degree of neglect, or the consequences of any misconduct in the performance of his task. The law fixes the degree of diligence required of the common carrier as a public agent, and this he cannot change by special contract. The proposition that he could do so, would imply that a public agent could contract in consideration of his own future malfeasance or nonfeasance in the performance of his trust. The degree of diligence required by law of the common carrier, is a matter over which he has no control, and in which the public is interested.

It has been held, that where the liability of a common carrier has been restricted by agreement, he is to be regarded in respect to that particular transaction, as not in the exercise of his public employment, but as an ordinary bailee for hire, and, therefore, liable only for a neglect of ordinary diligence. The reason upon which this opinion rests is not satisfactory. It is not true that the character of the employment is changed by such contract, and the carrier is not and cannot in fact be regarded as a mere private bailee for hire. He is still a common carrier, and not at liberty to refuse to perform his duties *as such*, even in regard to the particular transaction to which the contract relates.

In consequence of the nature of his employment, and its connection with the public interests, the common carrier is held to a higher degree of diligence than the private carrier. And he cannot be allowed, with proper regard for the public safety, to relieve himself to any extent from that care and diligence which has been enjoined upon him from considerations of great public interest. We are unanimous in holding that the common carrier cannot relieve himself to *any extent* by special contract, from losses occasioned by his own neglect; and that, although he may, by contract, restrict his liability as an *insurer*, yet that he cannot stipulate for a less degree of care and diligence, in the discharge of his duty, than that which pertains to his peculiar trust as a bailee.

The special stipulation in the contract offered in evidence in this

case, was, therefore, *valid* and *material*, and should have been set out in the declaration as part of the contract. Upon this ground there was a fatal variance between the proof and the declaration.

2. On the subject of the sufficiency of the proof of the loss of the goods in this case, the facts do not appear as fully as desirable. It seems, however, that the delivery of the goods to the defendants and the non-delivery of the same at the place of destination were not in dispute, and were admitted by the parties on the trial. And by the statement, that "the plaintiff offered no evidence to show the loss of the goods within the terms of the special contract," we understand is meant, that he offered no evidence to show that the loss did not fall within the special exceptions to the defendants' liability in the contract. The question which arises, therefore, is, whether it is incumbent on the owner of the goods, in case of exceptions to the liability of the common carrier by special contract, to prove that the loss did not fall within the exceptions.

The rule of evidence which is applicable here, has been very clearly and definitely settled. Proof that goods entrusted to a common carrier have never been delivered, either to the bailor or to the consignee, is *prima facie* evidence of loss by negligence, and sufficient to charge the carrier. In all cases of loss, the *onus probandi* is on the carrier to bring his liability within any *special exemption;* for it is said, that *prima facie*, the law imposes the obligation of safety on him. Angell on the Law of Carriers, sec. 202; Story on Bailments, sec. 529. Mr. Greenleaf, in his work on Evidence, vol. 2, sec. 219, says: "In all cases of loss by a *common carrier*, the *burden of proof* is on him, to show that the loss was occasioned by the act of God or by public enemies. And if the acceptance of the goods was *special*, the burden of proof is still on the carrier, to show, not only that the cause of the loss was within the terms of the exception, but also that there was, on his part, no negligence or want of due care. Thus, where goods were delivered on board a steamboat, and the bill of lading contained an exception of 'the dangers of the river,' and the loss was occasioned by the boat's striking on a sunken rock; it was held incumbent on the carrier to prove that due diligence and proper skill were used to

avoid the accident." This doctrine is founded on sound reason and fully sustained by authority. *Whiteside* vs. *Russell*, 8 Watts & Serg. 44.

In this case, therefore, the burden of showing the loss to have been produced by a cause falling within the exceptions rested upon the defendants. The non-delivery of the goods by the defendants according to the bailment, was sufficient *prima facie* evidence on the part of the plaintiff.

Upon the ground of variance, however, between the proof and the declaration, the District Court was correct in its ruling. The motion for a new trial is, therefore, overruled.

In the Supreme Court of Pennsylvania.

CHILDS & CO. *vs.* DIGBY.[1]

The goods of a non-resident debtor, in the hands of a person residing in this State, are liable to be held by a writ of foreign attachment, although the goods themselves are in another State.

Error to the District Court of Allegheny County.

This was a foreign attachment issued against Thomas Scandrett, December 17th, 1851, in which William Digby, the defendant below and in error, was made garnishee. The writ was served upon the garnishee, December 18th, 1851. Judgment by default was rendered against the defendant, Scandrett, and the plaintiffs proceeded to trial against the garnishee, on the plea of *nulla bona*.

On the trial, the following facts were established by the evidence: For two years prior to November, 1851, Thomas Scandrett had carried on a clothing store at Youngstown, in the State of Ohio. William Digby had furnished him goods, in pursuance of an agreement under seal, dated September 27th, 1849, in which it was stipulated, that, if at any time Scandrett should be indebted to Digby, it should be lawful for said Digby to enter the said

[1] We are indebted to the Pittsburg Legal Intelligencer for this case.—*Eds. Am. L. Reg.*

store, and take such portion of the *goods sold by him* to Scandrett, as would be sufficient to satisfy his claim. In July, 1851, Scandrett left his store in charge of a salesman, with instructions to carry on the business, and went on a trading expedition to Lake Superior.

On the 21st day of November, 1851, the stock in the store consisted of a large amount of goods purchased from Digby, and other goods purchased from other persons; which other goods were valued at $689 26. On that day, Digby, by virtue of the agreement above recited, took into his possession all the goods purchased from him by Scandrett, and the salesman delivered to him the balance of the stock, amounting to $689 26, and executed a chattel-mortgage for it, to secure the balance of his claim, which was considerably more than the value of the entire stock. No authority was shown to the salesman to execute the mortgage, or dispose of the entire stock at wholesale. In April, 1852, after the service of the foreign attachment, Scandrett ratified the act of his agent, the salesman, considering it the best thing that could be done.

The Court below, WILLIAMS, Assistant Judge, charged the jury that the matter and thing attached must be in the power and jurisdiction of the Court, and referred to the case of *Christmas* vs. *Biddle*, and that the attachment would not lie. After a verdict in favor of defendant, this instruction was assigned for error.

Shaler & Co., for plaintiff in error, cited several authorities to show that the salesman exceeded his powers, and that his act did not convey the property in the goods to Digby, 2 Harris, 105; 18 Johns. 362. There was no question made as to the goods which Digby had sold to Scandrett. The question whether the goods were bound by the writ, depended on the construction of the law regulating foreign attachments.

Todd and Smith, for defendant in error, cited Story's Confl. Laws, § 539; 1 Harris, 223.

The opinion of the Court was delivered by

LEWIS, J.—The observation of Mr. Justice Coulter, in *Christmas* vs. *Biddle*, 1 Harris, 223, that the attachment process is a

proceeding *in rem*, and the matter and thing attached must be in the power and jurisdiction of the Court, must be taken with some qualification. It is true, that "the attachment process is a proceeding *in rem*;" but, it is equally true, that it is something more. It is also a proceeding against the garnishee, *personally*, for the purpose of compelling him to answer for the value, where the thing itself is not produced. The summons, the judgment and the execution, contain the bones and sinews of a proceeding *in personam*, against the garnishee, by means of which his own estate may be taken in execution, if he fail to "answer interrogatories," or "to produce the goods and effects of the defendant" found to be in his hands or possession, or "neglect to pay the debt attached, if the same be due and payable." The ultimate object of the proceeding is to appropriate the debtor's assets to the payment of his debts, and this object is one which ought to be favored. It may be accomplished wherever the courts have jurisdiction over the person who has the actual possession of the property, and the power to dispose of it according to their direction, or wherever the property itself may be taken into actual possession by the officers of the law. Real estate follows the law of its *situs*, and bank stock that of its creation. Where the one is located in a foreign jurisdiction, or the other created by a foreign law, neither is the subject of attachment here in the hands of one who has neither possession, nor title, but simply a naked power to sell. *Christmas* vs. *Biddle*, 1 Harris, 223. But this is not the case with ordinary goods and effects. In general, any one having possession of goods or effects, may surrender them in obedience to a judgment in a foreign attachment, although they may happen to be within a foreign jurisdiction at the time the writ was issued. The possession of them gives the power of removal and surrender. While this exists in the garnishee, there is no reason why he should not be compelled to exercise it in furtherance of the object of the law, and in advancement of justice. It was thought, at one time, that a foreign attachment would not lie on a debt contracted out of the jurisdiction. 2 Show. 373; Lord Raym. 346. But this was afterwards denied, and it was held that the debt always follows the

person of the debtor, and it is not material where it was contracted. *Andrews* vs. *Clarke*, Carthew, 25. In personal property the *lex loci rei sitæ* is not to be recognized. All that is required to sustain the proceedings against the garnishee, is, that he be within the jurisdiction of the Court when the writ was served, and that the property attached be in his hands or possession." The Court was in error, in directing the jury that the attachment would not lie for goods delivered to Digby in Ohio.

This disposes of the only point determined by the District Court; but, as the cause goes back, it is proper to express our opinion on the other points. A stranger has no right to object that an agent exceeded his power, 5 Johns. R. 44. But, where an agent exceeds his authority, and an interest has attached in favor of another, a subsequent ratification will not divest such interest, 5 East, 491. Where an agent exceeds his authority, the principal is bound to disavow it the first moment the fact comes to his knowledge, or he makes the act his own, 14 S. & R. 27. The first, second and third points ought to have been answered in the affirmative.

As we do not see how an affirmative answer to the fourth would have sustained the attachment, or otherwise have benefited the plaintiff, it was not error to refuse to answer it. If Digby is chargeable with the goods as assignee in trust for creditors, the present is not the form of proceeding in which that trust can be enforced.

Judgment reversed, and *venire de novo* awarded.

In the Supreme Court of Pennsylvania.

PHILLIPS ET AL. *vs.* DUNCAN.

Where a Mechanic's lien was filed for materials furnished at different dates within two years prior to the filing of the claim, it was *held*, that in the absence of a special contract, no recovery could be had on the scire facias, except for materials furnished within six months prior to the filing of the lien.

Error to District Court of Allegheny county.

This was a scire facias sur mechanics' lien filed for materials furnished during the year 1850 and 1851. On the 2d of May 1854,

a verdict was rendered for the plaintiff below and defendant in error, for the whole amount of his claim, subject to the opinion of the Court upon the question, whether the lien filed in this case is sufficient to entitle the plaintiff to recover; and also, whether the plaintiff is entitled to recover for the items of lumber and materials furnished more than six months before the filing of the lien. And if the Court should be of the opinion, that the law is with the plaintiff on both questions, then judgment to be entered in his favor upon the verdict. If the Court should be of opinion that the law is with the plaintiff on the first point and not on the second, the judgment to be entered in favor of the plaintiff for the sum of $26 56, with interest from August 2, 1851; but if the Court should be of opinion that the law is with the defendants, then judgment to be entered in their favor, *non obstante veredicto.*

The Court rendered judgment for the plaintiff below on both points.

Two errors were assigned, the first to the insufficiency of the description, which is set forth distinctly in the opinion of the Court. The second was to the entry of judgment for items which were furnished more than six months prior to the filing of the lien.

The case was argued by

Darrah and Mellon for plaintiff in error, and by

C. Hasbrouck, Esq., for defendant in error.

The opinion of the Court was delivered by

WOODWARD, J.—The first error assigned is not sustained. The lien is sufficiently certain. In Barclay's Appeal, 1 Harris, 495, there was nothing on record to show to what buildings the materials furnished, were applied. Here there is. We have a bill of specification, charged to have been furnished for two certain two-storied brick houses, (particularly described) with the ground on which they stand, and said to belong to Elias Phillips, and Mary his wife. This individuates the buildings with reasonable certainty, and that is all the act of Assembly requires.

But the second error is, we think, well assigned.

The account filed shows that of the materials furnished, $25 53 worth only were supplied within six months before the lien was en-

tered—all the rest were furnished beyond that period. Where materials are furnished under a *special contract*, as for the brick or lumber of a particular house, the lien may be entered within six months after the delivery of the last items, for that is the completion of the contract, (7 Harris, 341); but a contractor who goes to a lumber merchant, and obtains lumber as he needs it for the job in hand, makes a new contract at each purchase, and the statute bars all of the account more than six months old at the filing of the lien. Such seems to have been the case here. No special contract was shown, and there is no allegation that all the materials were furnished within the six months, as in 2 Harris, 56, and ibid. 167. The copy of the account filed shows that they were not, and, therefore, for so much of his claim as represents materials furnished before that period, the plaintiff ought not to have judgment.

The judgment is reversed, and judgment is entered here for the plaintiff for $25 53, with interest from 1st July, 1854, and costs.

In the Supreme Court of Texas.

MIGUEL YENDO ET AL. *vs.* JESSE WHEELER ET AL.[1]

1. Where land is sold under a tax-law, it is necessary that every pre-requisite in the statute should be strictly complied with; otherwise, the purchaser under the tax-sale will take no title.

2. An assessment to be valid under the Texas statute, with a view of collecting the taxes, must embrace a true description of the land, together with the name of the actual owner, whether resident or non-resident, and such other descriptive matter as will apprise the owner that his land is about to be sold for taxes.

The opinion of the Court, in which the facts appear, was delivered by

WHEELER, J.—The plaintiffs brought their action of trespass to try title to a league of land. They claimed as heirs of Manuel Yendo and his wife, Casiana Zambrano, under a title issued by the Commissioner of De Leon's colony, in 1833. The defendant

[1] This case has been kindly furnished us by a professional friend in Galveston, Texas, who assures us that the subject discussed is of much practical importance to our subscribers in that section of the Union.—*Eds. Am. L. Reg.*

claimed under a purchase made at a sale of the land for taxes, in 1850. The plaintiffs gave in evidence the grant to Zambrano, and proved that they were the heirs of the grantee, and that her husband, Manuel Yendo, died in 1828 or 1829. The defendants introduced, as evidence of titles in themselves, the deed of the assessor and collector of the county, bearing date on the 22d day of August, 1850, made in pursuance of a sale for the taxes for the year 1849. The deed recites the levy was made "upon the following property of the said M. Yendo, to wit: 4428 acres of land lying and situated on the Garcitas creek, adjoining the land of R. Rios and F. De Leon, as will appear by reference to the map of the county of Victoria." The deed purports to convey "all the right title and interest of the said M. Yendo, or of any other owner or claimant of the same unknown, under him, in and to the above described premises." The assessor testifies that he sold the land as the property of M. Yendo, a non-resident delinquent tax payer, from information derived from the map of the county. That the land was marked on the map as belonging to M. Yendo, and did not appear, by the records, to be claimed by any one else. He further testified, at the instance of the plaintiffs, that he levied on the land, by virtue of his tax list, of which he had three copies, that he had a rough draft of the non-resident delinquent tax payers, not on his alphabetical list, but on a separate piece of paper; that these three rolls were not exact copies of this list; that he had forwarded to the proper office at Austin one of the copies, and had deposited one in the county clerk's office, retaining one himself; he did not recollect, whether he had kept or destroyed the rough draft. The plaintiffs objected to the introduction in evidence of the assessor's deed, but their objection was overruled. After the assessor had given his testimony, they moved the court to exclude the deed, which the court refused. The plaintiffs asked, among others, the following instructions, which were refused by the court, viz: "That the requirements of the assessment law must be strictly complied with, and that any material variance therefrom, when proved, is fatal to a deed made by virtue of a tax sale. 2d: That where it is shown that the assessor failed to state in his assessment roll the number of acres and the patentee or person

for whom the original survey was made, it is a fatal defect in the sale made under such assessment." There was a verdict for the defendant, a motion for a new trial overruled, and judgment on the verdict; and the plaintiffs appealed.

The question to be determined is as to the validity of the title of the defendants, acquired by their purchase at the sale of the land for taxes. To vest a title in the purchaser, the officer must have the power to sell, and the requirements of the law must have been complied with in making the sale. The authority of the officer to sell land for the non-payment of taxes, under the laws conferring the authority, is, in the language of the court in *Williams* vs. *Peyton*, 4 Wheat. 77, "a naked power, not coupled with an interest; and in all such cases the law requires that every pre-requisite to the exercise of that power must precede its exercise, that the agent must pursue the power, or his act will not be sustained by it." This principle was recognized in the case of *Hadley* vs. *Tankersly*, 1 Texas Rep. And it was held that under the act of 1840 which did not make the deed prima facie evidence of the regularity of the sale, the party claiming under it must prove that all the pre-requisities of the law had been complied with in making such sale." This statute does not dispense with a compliance with the requirements of the law by the officers, or relieve the purchaser from the effect of a non-compliance; but only changes the burden of proof from the purchaser to the party impeaching his title; it is as necessary to the validity of the title now as it was, before this statute was enacted, that all the pre-requisites of the law should have been complied with. The principle, that the officer must exercise his authority strictly in conformity to law or his act will be invalid and will vest no title in the purchaser, is not affected by the statute. But it makes his deed prima facie evidence of the regularity of the sale, and throws upon the party impeaching the title of the purchaser, the necessity of proving that the requirements of the law were not complied with in making the sale. A distinction has been taken by counsel for the appellant between the power to sell, and the regularity of the sale; and there, manifestly, is a clear distinction. The proceedings in making the sale may be regular, and the sale inef-

fectual to pass the title for the want of power in the officer to make it. This distinction has been recognized by the Supreme Court of New York, in the cases cited by counsel; and it is there held, that the statute of the State, which makes the deed conclusive evidence of the regularity of the sale, and declared that it shall vest in the grantee an absolute estate in fee simple, applies only to the proceedings to be had, after the right and power to sell are acquired. 2 Comstock, 66; 18 Johns. 441. To empower the assessor to sell, there must have been a legal assessment of the taxes, and a failure to pay them; and there are other provisions of the law which must have been complied with, before the right and power to sell will have been acquired. Hart. Dig. arts. 3133, 3136, 3137, 3138, 3150.

It is not necessary here to determine, whether the assessor's deed is *prima facie* evidence under the act of 1848, before cited, of the existence of those facts, or that the requirements of the law were not complied with; and the decision of this case turns upon the inquiry, whether the evidence establishes such non-compliance with the requirements of the law. That it does, will, we think, be apparent by a comparison of the provisions of the law with the acts done by the officer in one or two essential particulars. The statute provides that all property shall be assessed "in the name of the owner, if known, and if not, then it shall be assessed by a description of the property; if lands, it shall be described by the number of the tract, quantity of acres, and to whom patented." Hart. Dig. art. 3137. The statute thus plainly requires that the land shall be assessed in the name of the owner, if known; but if he be unknown, it must be assessed by a description of the land. It provides what that description shall contain, and one of its essential constituents is the name of the grantee. The assessment in this case was made in the name of the supposed owner, M. Yendo. This, however, was a mistake. Manuel Yendo was neither the owner nor the grantee. He had died several years before the grant was made. Casiana Zambrano was the grantee, and the owners were her heirs, the present plaintiffs. It is manifest, therefore, that the land was not assessed, either in the name of the

owner, or by such a description as the statute requires; that it is one embracing, among many other particulars mentioned, the name of the grantee. That it should have been in the one mode or the other, clearly was necessary to the validity of the assessment. It may be said that it was the fault of the plaintiffs, that their title was not recorded in the county; and it is true that it should have been so recorded. But if this afforded an excuse for not knowing who the owners were, it afforded none for not giving a correct description of the land by the name of the grantee. This could have been easily ascertained by reference to the abstract of original titles. The owners are not accountable for mistakes made in the county map, in causing which they had no agency. The statute further requires of the assessor to make out "three descriptive lists of all taxable property in his county, on which the taxes remain unpaid, belonging to non-residents, who shall be named, if known; if unknown, shall be so described: one of which lists shall be filed in the office of the clerk of the county court of his county. Another shall be posted at the court-house door of said county, and the other shall be transmitted to the comptroller of the public accounts. Ibid. art. 3150. The assessor testifies that he made out three copies of his tax-list, one of which he forwarded to the proper officer at Austin, and one he deposited in the county clerk's office, retaining the other himself. It appears, therefore, that instead of posting up one copy at the court-house door, as the law required, he retained it in his possession. This was a material departure from the requirement of the law; one object of which was to apprise the owner that his land was to be subjected to sale for the taxes, and to afford him an opportunity of preventing the sale by prompt payment. In the case of *Zallman* vs. *White*, 2 Comstock, 66, a case in point, the Court of Appeals of New York held this language: "An accurate designation or description of the land assessed is essential to the validity of the assessment. The assessment of non-residents' lands is made with the ultimate view of collecting the tax, by advertisement and sale of the land, if it should not be voluntarily paid. The controller's sale is a rigorous proceeding. It divests the owner of his title

without his consent, and often for a very trivial consideration; and the Legislature has, therefore, shown a cautious solicitude that it should not be done without his knowledge." The assessment must contain a true description of the land, in order that the purchaser may be enabled to know what land he is purchasing, and that the owner may know, from the advertisement required to precede the sale, that his land is exposed to sale, and that he may save it by paying the tax. If the land be misdescribed in the assessment, it will, of course, be misdescribed in the controller's and county clerk's offices, and in the notices and advertisements. The mistake and falsity of description in the assessment necessarily runs through, and invalidates all the subsequent proceedings. In the case cited, it was said: "An assessment of non-resident land is fatally defective and void, if it contains such a falsity in the designation or description of the parcel assessed as might probably mislead the owner, and prevent him from ascertaining by the notices that his land was to be sold or redeemed. Such a mistake or falsity defeats one of the obvious and just purposes of the statute, that of giving to the owner an opportunity of preventing the sale by paying the tax."

It is obvious that the misdescription of the land in this case was calculated to mislead It is not to be supposed that an advertisement of the land of M. Yendo, would apprise those claiming title under a grant to Casiana Zambrano, that theirs was the land intended. To hold their title divested by a sale under such circumstances, would be to defeat the manifest intention of the Legislature, in the various provisions made to protect the right of the owner of land liable to be sold for the non-payment of taxes. But if the title were not obnoxious to this objection, there is another which must be held fatal to the right of the defendant, under his deed from the assessor. The deed professed to convey only the "right, title and interest of M. Yendo, or of any other owner or claimant of the same, unknown, under him." If the deed had assumed to convey the title of the unknown owner, without reference to its derivation, or the person under whom he claimed, and the proceedings had been otherwise regular, it might have been